IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

THEODORE WHITMORE STANLEY, *et al.*, Plaintiffs, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. DARLINGTON COUNTY SCHOOL DISTRICT, *et al.*, Defendants.	C/A No. 4:62-7749-22 **ORDER**

I. BACKGROUND

On October 24, 1995, this court issued an Interim Order which held in part that "[t]he enrollment process for Mayo High School will be operated so as to ensure a 50/50 white-black ratio of students with no variance for a period not to exceed three years. The court may extend the racial balance requirement beyond the three year period if such a mechanism is necessary to ensure the orderly desegregation of the Mayo school." The Interim Order further provided that "[d]uring the start-up years, the District will admit eligible students from other grade levels to fill vacancies that may exist [in a particular grade level] after the enrollment period ends; however, the school-wide 50/50 racial balance . . . will be maintained."[1]

[1]This provision allowed the District to vary the total number of students per grade. For example, if an insufficient number of upperclass students applied, ninth and tenth grade classes could be expanded during the start-up years. It did not allow for any variance of racial balance within individual grades.

By motion filed April 18, 1996, the District sought a variance from the previously approved Mayo selection and admission procedure. In effect, the District sought permission to admit all qualified students without regard to the effect on desegregation in the District and the other purposes for which Mayo has been established. The position of the District is essentially the same as that rejected by the court in its prior Orders of October 24, 1995, and February 22, 1996. In other words, the District proposes that the court now remove the 50/50 school-wide racial balance requirement and approve admission of a student body comprised of 44% Black and 56% Other for the first year of operation.[2]

II. FINDINGS OF FACT

The District-wide racial composition at the high school level is 56% Black, 44% Other. The requested Mayo variance to 44% Black and 56% Other is thus a 12% variance from the District-wide ratio.

The history of and rationale behind the 50/50 racial balance requirement is set forth in detail in the court's Order of February 22, 1996. Witnesses supporting the 50/50 requirement at the evidentiary hearing in October 1995 testified that balanced racial makeup was critical to attracting non-minority students to a formerly black school which had suffered from shockingly disparate treatment up to the time of the trial of this case in May 1994. The experts all agreed that the 50/50 plan might cause the school to open below capacity in the first years and that, initially, it was more likely that black students might be adversely affected. In other words, there

---

[2]The District actually has submitted four versions of variances to be considered by the court in determining whether a variance should be permitted. The District requests that the court accept Version Four, under which all qualified applicants would be allowed to attend. This would result in 102 Black and 130 Other students, a ratio of 44% to 56%. Version Two, which this court approved by Order filed April 30, 1996, admits five additional Black and ten additional Other but maintains a 50% to 50% ratio with 102 Black and 102 Other.

was concern that fewer whites than blacks would apply, and that the 50/50 plan would result in blacks who wished to attend Mayo not being admitted due to insufficient numbers of whites.

Nevertheless, the 50/50 plan ordered by the court achieved its purpose. Assured that the school would have a 50/50 racial composition, large numbers of whites applied. The net result is that there are more whites than blacks who applied and were qualified.[3] Some students elected not to attend after being accepted. The result was a final student population of 97 Black and 92 Other. The waiting list for 9th grade is comprised of 24 Other. The waiting list for 10th grade is comprised of 5 Black, and the waiting list for 11th grade is comprised of 14 Other. Thus, there are more whites on the waiting list than blacks.

The selection and admission procedure used by the District attempted to achieve 50/50 racial balance at each grade level. This did not occur, and, as an alternative to Version Four, the District seeks authority to vary from the procedure insofar as it requires 50/50 racial balance at each grade level.

In order to balance the school and admit as many qualified students as possible the District has proposed in Version Two that 15 students from the waiting list be admitted. If this is done all 5 Black and 10 additional Other students will be admitted. This would result in 102 Black and 102 Other students being admitted. Thus, 28 Other students would remain on the waiting list.

The United States has filed a Response to the District's motion. The United States opposes the District's request to lift the 50/50 school-wide requirement and admit the remaining Other students on the waiting list. The United States does not, however, oppose Version Two

---

[3]It should be noted that the same academic requirements applied to all applicants regardless of race.

under which 15 waiting-list students are admitted and the 50/50 racial balance per grade level is varied.

III. CONCLUSIONS OF LAW

The court has determined that the District's motion should be granted in part and denied in part. The motion is granted as to Version Two. In all other respects, the motion is denied.

The use of racial percentages for admission to magnet schools has been upheld by the First, Second, Fifth, Sixth, Eighth and Eleventh Circuits. *See Jenkins v. Missouri,* 942 F.2d 487, 493 (8th Cir.), *cert. denied,* 502 U.S. 907 (1991); *Stell v. Savannah-Chatham County Bd. of Ed.*, 888 F.2d 82, 85 (11th Cir. 1989); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1215 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *Davis v. East Baton Rouge Parish School Bd.*; 721 F.2d 1425, 1440 (5th Cir. 1983); *Brinkman v. Gilligan*, 583 F.2d 243 (6th Cir. 1978), *aff'd*, 443 U.S. 526 (1979); *Morgan v. Kerrigan*, 530 F.2d 401, 423 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976). As recently as last term, the Supreme Court emphasized the importance of magnet schools as an intra-district desegregation remedy. *Missouri v. Jenkins*, 115 S. Ct. 2038, 2051 (1995).

In the Order of February 22, 1996, this court grappled with the issue whether the 50/50 plan was a "racial classification subjecting [a] person to unequal treatment" as described by the Supreme Court in *Adarand v. Pena*, 115 S. Ct. 1097, 2111 (1995). The *Adarand* Court clearly intended "racial classifications" to include all instances whereby one racial group is accorded a benefit or preference based solely on race. *Id*. *See also Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *United States v. Paradise*, 480 U.S. 149 (1987); *Wygant v. Jackson Board of Ed.*, 476 U.S. 267 (1986). Noting that some courts had applied intermediate scrutiny to race-conscious policies which were not race preferential, (Order of 2/22/96, at 23-24) this court nevertheless

concluded that the 50/50 plan survives even strict scrutiny (Order of 2/22/96, at 24-25).[4]

The purpose of the Mayo magnet, as one component of the District's overall plan, is to "further desegregate the District, remedy past stigma and injury, and equitably distribute the burdens of desegregation." *Stanley and United States v. Darlington County Sch. Dist.*, 879 F. Supp. 1341, 1389 (D.S.C. 1995). Until it was closed as a regular high school pursuant to the Consent Order, Mayo High School was a significantly deprived Black high school as a result of racial discrimination. *See* Orders of March 1, 1995, and February 22, 1996. This is not a case of remedying the present effects of past discrimination. *Cf. Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995). This case presents *present* effects of continuing discrimination. Moreover, the relief ordered here is designed to remedy the effects of racial discrimination, not merely to further an interest in diversity. *Cf. Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996). Remedying the effects of racial discrimination is a compelling state interest. This court has previously set forth its basis for concluding that the Mayo magnet is an appropriate, narrowly tailored remedy for the pervasive, systematic and obstinate racial discrimination against the former Mayo High School.

This court has reviewed the Progress Reports concerning the Mayo Magnet. It appears that Mayo High School for Math, Science and Technology will open as scheduled with appropriate teachers, books, facilities and equipment.

The response of the community has been quite positive, and the student body will be a well qualified, racially balanced group of young people. At this point it appears that the Mayo

---

[4]This court is mindful of the Fourth Circuit's strict scrutiny analysis in *Podberesky v. Kirwan*, 38 F.3d 147 (1994), *cert. denied*, 115 S. Ct. 2001 (1995); *Hayes v. North State Law Enforcement Officers Ass'n.*, 10 F.3d 207 (1993); and *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072 (1993). In each of those cases, however, minority applicants were afforded preferential treatment based on race, which is not the case here.

magnet has the potential to become the exemplary school it was intended to be. As such, it will achieve its purposes, that is, to "further desegregate the District, remedy past stigma and injury, and equitably distribute the burdens of desegregation." More significantly, it will provide a quality education. Version Two will make that education available to more Darlington County students in the short term without compromising the long term viability of the Mayo magnet.

IV. ORDER

IT IS THEREFORE ORDERED that the District's April 18, 1996, Motion is granted in part and denied in part as set forth above.

SO ORDERED.

_____
CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

May ___, 1996
Florence, South Carolina